

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BENJAMIN WAYNE MERRING,	:	
	:	
Petitioner	:	
	:	CIVIL NO. 4:09-CV-2070
	:	
v.	:	Hon. John E. Jones III
	:	
	:	
JANINE DONATE, <i>et al.</i> ,	:	
	:	
Respondents	:	

MEMORANDUM

March 25, 2010

THE BACKGROUND OF THIS MEMORANDUM IS AS FOLLOWS:

Petitioner Benjamin Wayne Merring (“Petitioner” or “Merring”), an inmate presently confined at the Lackawanna County Prison in Scranton, Pennsylvania, commenced this *pro se* action by filing a Petition for Writ of Habeas Corpus (“Petition”). (Doc. 1.)

Although Merring did not characterize his Petition as having been filed under the provisions of 28 U.S.C. § 2254, because he is in custody pursuant to the judgment of a State court, in our December 16, 2009 Order, we determined that his Petition is cognizable under 28 U.S.C. § 2254, and construed it as such. (Doc. 4.) In that same Order, in accordance with *United States v. Miller*, 197 F.3d 644 (3d Cir. 1999), and

Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000), we issued a formal notice to Merring that he either could have his Petition ruled on as filed, or withdraw his Petition and file one all-inclusive § 2254 petition within the one-year statutory period prescribed by the Antiterrorism and Effective Death Penalty Act (“AEDPA”). (*Id.*)

After requesting an extension of time to file his Notice of Election, which was granted, on March 24, 2010, Merring filed a Notice of Election. (Doc. 10.) Although Merring did not utilize the form Notice of Election that was attached to this Court’s December 16, 2009 Order, he provided a handwritten Notice in which he states that he chooses to withdraw his Petition as filed so that he may file one, all-inclusive petition. (*See id.*) Our December 16 Order stated that “[i]f Petitioner decides to file an all-inclusive § 2254 petition raising all grounds for relief, Petitioner’s Notice of Election form must also be accompanied by his new § 2254 petition. If the new § 2254 petition does not accompany the Notice of Election, the Court will dismiss this case without prejudice.” (*See* Doc. 4 ¶ 3.) Because a new § 2254 petition did not accompany Merring’s Notice of Election, his Application for leave to proceed *in forma pauperis* (Doc. 2) will be granted for the sole purpose of filing the Petition, and the Petition (Doc. 1) will be dismissed without prejudice. An appropriate Order will enter.